(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 3 0 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification for the beneficiary as an "alien of exceptional ability," as a nurse, pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). The petitioner further asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I.

The director found that the beneficiary does not have "a degree of expertise above that encountered by her peers in the field." The director also found that "the application for labor certification does not establish [that] the proferred position requires an alien of exceptional ability, or a professional holding an advanced degree, and does not support the requested second preference classification." Finally, the director found that the petitioner did not provide a prevailing wage determination. Therefore, "the petition [wa]s not accompanied by a proper application for labor certification."

On appeal, counsel submits a brief and additional evidence. The AAO notes that the filing date of the original petition was August 20, 2008. Therefore, evidence submitted in response to the director's request for evidence and on appeal which reference events that occurred after the date of filing may not be considered here. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176.

On appeal, counsel cites to the decisions *Matter of Pan Am,* 7 I&N Dec. 634 (Reg'l Comm'r 1957) and *Matter of G-F-S*, 7 I&N Dec. 37 (Reg'l Comm'r 1955). Based on the time period for the cases cited, the preference categories and immigration framework were different. Both decisions were based upon section 203(a)(1)(A) of the Act in effect in 1952 which stated: "to qualified quota immigrants whose services are determined by the Attorney General to be needed urgently in the United States because of the high education, technical training, specialized experience, or exceptional ability of such immigrants and to be substantially beneficial prospectively to the national economy, cultural interests, or welfare of the United States." The Immigration Act of 1990 (IMMACT 90) created five categories under the amended 8 U.S.C. § 1153(b), four of which were employment based, and the fifth related to employment creation. Furthermore, although counsel asserts that these decisions indicate that there is no "requirement" that an individual of exceptional ability needs to have "'a degree of expertise above that encountered by her peers in the field'" and that it "is one that is made up by the Service," the AAO is bound by the regulation at 8 C.F.R. § 204.5(k)(2). *See Arctic Ice Cream Novelties, L.P. v. Reno*, 134 F.3d 376 (1998) (deferring to the current regulatory definition of exceptional ability).

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). For the reasons discussed below, upon review of the entire record, the AAO upholds the director's conclusion that the petitioner has not established the beneficiary's eligibility for the exclusive classification sought.

I. LAW

Section 203(b) of the Immigration and Nationality Act (the Act) states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.--
>
> (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the following six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought
>
> (C) A license to practice the profession or certification for a particular profession or occupation
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability
>
> (E) Evidence of membership in professional associations
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 1119-20. Only aliens whose achievements have garnered "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 119-22.

While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning in *Kazarian* persuasive to the classification sought in this matter. Specifically, the regulations state a regulatory standard and provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination.

The *Kazarian* court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence on behalf of the beneficiary under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Evidentiary Criteria[1]

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

[1] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

The petitioner submitted the beneficiary's official academic record showing that the beneficiary received a diploma in Nursing from .

The beneficiary's diploma is qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A).

A license to practice the profession or certification for a particular profession or occupation

The petitioner submitted a copy of the beneficiary's nursing license from the state of California.

The beneficiary's nursing license is qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(C).

Evidence of membership in professional associations

The plain language of the regulation at 8 C.F.R. § 204.5(k)(3)(ii)(E) requires evidence of membership in professional "associations" in the plural. Significantly, not all of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (C) and (D) only require one academic record, a single license and a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context, federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation.[2]

In response to the director's request for evidence, the petitioner submitted a copy of the beneficiary's card from the American Heart Association and copies of paystubs, which indicate payment of "CNA" dues.

Regarding the card from the American Heart Association, the "card certifies that the...[beneficiary] has successfully completed the national cognitive and skills evaluations in accordance with the curriculum of the American Heart Association for the Advanced Cardiovascular Life Support Program." No evidence was provided to indicate that the card was issued to a "member" of a professional association, rather than an individual who completed a specific training. Furthermore, the issue date of the card is November 14, 2009. As previously discussed, eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49.

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[2] *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

The petitioner submitted a copy of the beneficiary's paystubs indicating "CNA Dues" of $34.21 per pay period. Counsel states that the dues are for the California Nurse Association. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, given that counsel stated in the original petition that the beneficiary "is strictly prohibited [from] employment in the U[nited] S[tates] given her status as [a] TD," the AAO can only conclude that the beneficiary did not begin paying such dues until after the filing date of the petition. As previously discussed, eligibility must be established at the time of filing.

In response to the director's request for evidence, counsel also asserted that the beneficiary's license from the California Board of Registered Nursing is evidence under this criterion. The beneficiary's license has already been addressed under 8 C.F.R. § 204.5(k)(3)(ii)(C). The AAO will not presume that evidence relating to or even meeting the license criterion is presumptive evidence that the beneficiary also meets this criterion. To hold otherwise would render meaningless the regulatory requirement that a petitioner meet at least three separate criteria. Therefore, the beneficiary's license will not be considered under this criterion, as the license criterion has already been addressed above.

Finally, as defined at section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The record does not establish that a baccalaureate is the minimum requirement for entry into the occupation as a nurse. As such the petitioner has not established membership in a "professional" association as mandated under 8 C.F.R. § 204.5(k)(3)(ii)(E).

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(E).

Finally, section 203(b)(2)(c) of the Act expressly states that "possession of a []diploma...or a license to practice...shall not by itself be considered sufficient evidence of such exceptional ability." Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated that the beneficiary has a degree of expertise significantly above that ordinary encountered. 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of

such expertise, the AAO need not explain that conclusion in a final merits determination.[3] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

Therefore, the documentation submitted has not shown that the beneficiary has a degree of expertise significantly above that ordinarily encountered and the petitioner failed to establish the beneficiary is qualified for classification as an alien of exceptional ability under section 203(b)(2) of the Act. Thus, the petitioner has not established that the beneficiary is qualified for the benefit sought. On that basis alone the petition cannot be approved.

II. SCHEDULE A GROUP I DESIGNATION

A. The Offered Position

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation for classification as aliens who are members of the professions holding advanced degrees or aliens of exceptional ability:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. *The job offer portion of* the individual labor certification, *Schedule A application*, or Pilot Program application *must demonstrate that the job requires* a professional holding an advanced degree or the equivalent or *an alien of exceptional ability.*

(Emphasis added.) As required by statute, a certified ETA Form 9089, Application for Permanent Employment Certification, in duplicate accompanied the petition. The job offer portion of the labor certification in this matter indicates that the proffered position requires an associate's degree in Registered Nursing and 6 months of experience in the job offered. Item 14 of the ETA Form 9089 provides only that "[c]ompletion of an accredited RN program, AS/ADN degree, Bachelor's Degree (in Nursing) preferred. Current CA RN License and BLS provider card ACLS/PALS/NRP if required by Nursing Department."

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[3] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d at 145. In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

The director discussed the deficiencies in the job offer portion of the labor certification and found that "the application for labor certification does not establish the proffered position requires an alien of exceptional ability, or a professional holding an advanced degree, and does not support the requested second preference classification." Contrary to counsel's assertions, the labor certification filed in support of a Schedule A application for classification as an alien of exceptional ability must still comply with the regulation at 8 C.F.R. § 204.5(k)(4), a regulation counsel does not address.

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added).

As the petitioner failed to demonstrate that the job requires an alien of exceptional ability in the job offer portion of the labor certification as set forth at 8 C.F.R. § 204.5(k)(4), the petition cannot be approved.

Beyond the decision of the director, the AAO also finds that the petitioner has not established that the beneficiary meets the minimum requirements set forth in the Form ETA-9089. As stated above, the minimum education requirement is an associate's degree in Registered Nursing or its foreign equivalent. The record contains a copy of a "Diploma" from in Canada. The regulation at 20 C.F.R. § 656.15(e) provides in pertinent part that "[a]n Immigration Officer…determines whether or not the alien is qualified for the Schedule A occupation." As the record does not contain evidence that the beneficiary's "Diploma" is the foreign equivalent of an associate's degree, the petition cannot be approved.

B. Prevailing Wage Determination and Notice of Filing

The regulation at 20 C.F.R. § 656.15 provides, in pertinent part:

(a) *Filing application.* An employer must apply for a labor certification for a Schedule A occupation by filing an application with the appropriate DHS office, and not with an ETA application processing center.

(b) *General documentation requirements.* A Schedule A application must include:

(1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.

(2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.40 (2008) provides in relevant part:

> (a) Application process. The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer....[4]
>
> (b) *Determinations.* The SWA determines the prevailing wage as follows:
>
> (1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the "prevailing wage" for labor certification purposes.

The regulation at 20 C.F.R. § 656.10(d)(1) states that notice of the filing must be provided:

> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.
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> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the

[4] The regulation at 20 C.F.R. § 656.40 now provides that on or after January 1, 2010 employers must request a prevailing wage determination from the National Processing Center.

normal procedures used for the recruitment of similar positions in the employer's organization.

At stated by the director in his denial, the petitioner, both in response to the director's request for evidence and with the original petition, "submit[ted] a printout from the Foreign Labor Certification Data Center's Online Wage Library showing various rates of pay for registered nurses" in the area of employment. The record does not contain a prevailing wage determination from the SWA as required by regulation, and as requested by the director in his request for evidence. For the first time on appeal, counsel asserts that because "the wage rate set forth in the CBA will be considered the prevailing wage[,]...a separate prevailing wage determination will only be redundant and serve no useful purpose in the case." While counsel is correct in that, according to 20 C.F.R. § 656.40(b)(1), the "wage rate set forth in the CBA agreement...is considered the 'prevailing wage' for labor certification purposes," the petitioner must still comply with the regulation at 20 C.F.R. § 656.15(b)(1). The AAO notes that on the Form ETA 9089, the petitioner indicated that the prevailing wage information was based upon the "US-DOL Online Wage Library," not on a CBA, and responded "N/A" regarding notification to the bargaining representative. Furthermore, the petitioner submitted a posting notice with the original petition, not evidence of notification to the bargaining representative.

The methods vary by which a petitioner can be notified of evidentiary requirements. For example, a petitioner is considered to be on notice through the specific requirements outlined within the regulations, or through various forms of communication from USCIS to a petitioner or applicant noting an evidentiary deficiency or requesting more evidence. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The regulations at 20 C.F.R. §§ 656.15(b)(1) and 656.40(b)(1) notified the petitioner of the specific requirements regarding the prevailing wage determination. In addition, the director issued a request for evidence. In instances when the petitioner was notified of the evidence required to demonstrate eligibility and was afforded the opportunity to provide the evidence prior to the issuance of an adverse decision, new eligibility claims will not be considered on appeal. *Id.*

Furthermore, as the petitioner submitted evidence that the beneficiary is covered under a CBA, the AAO finds that the petitioner did not conform with the notice of filing required by the regulation at 20 C.F.R. § 656.10(d)(1)(i). As the record does not contain evidence that the bargaining representative was notified of the filing, the petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.